Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-736

JOHN F. DRISCOLL,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on October 12, 1971.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is not yet reported, but is annexed hereto as an Appendix, commencing at page 12.

A Memorandum and Order denying a petition for rehearing is also annexed hereto as an Appendix, commencing at page 18.

Judgments Below

The judgment of the United States District Court for the District of Massachusetts was entered on March 1, 1971.

The judgment of the Court of Appeals for the First Circuit was entered on October 12, 1971, and is annexed hereto as an Appendix, commencing at page 17.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1) and Rule 22(2). The judgment of the Court of Appeals was entered on October 12, 1971. A timely petition for rehearing was denied on November 8, 1971, and this petition for certiorari was filed within thirty (30) days of that date.

Questions Presented

1. Where the defendant testified on cross-examination that he had not informed the authorities, even anonymously, that a crime might then still be in progress, and where the point was stressed by the prosecutor through the remainder of the trial, was it error for the trial court to refuse to instruct, as duly requested, that the defendant had no duty to notify the authorities?

2. Was it error for the trial court to instruct that the defendant was responsible for the acts of any person, if committed with his "consent"?

Statutes Involved

8 U.S.C.A.

§ 1324. *Bringing in and harboring certain aliens; persons liable; authority to arrest*

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who —

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

* * *

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, . . .

18 U.S.C.A.

§ 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Statement of the Case

A. *The Proceedings Below*

This is a petition seeking review of a judgment of the Court of Appeals for the First Circuit affirming a judgment of conviction of the District Court for the District of Massachusetts.

On March 20, 1970, a three-count indictment was returned against the petitioner. The first count charged him with willfully aiding and abetting an attempt to bring into the United States two aliens not duly admitted and not lawfully entitled to enter and reside here, in violation of 8 U.S.C. 1324 (a) (1). The third count charged a conspiracy to commit the aforementioned substantive offense and a related offense, in violation of the general conspiracy statute, 18 U.S.C. 371. The second count, charging a related substantive offense, was withdrawn by the Government before submission to the jury:

Trial commenced on February 9, 1971, and concluded on February 12, 1971, with verdicts against the petitioner on the two counts submitted to the jury. The defendant was sentenced to one year's imprisonment and to pay a fine of $1,000 on the substantive count. A concurrent sentence of one year's imprisonment was imposed on the conspiracy count. On March 1, 1971, judgment of conviction was entered by the District Court.

On October 12, 1971, the Court of Appeals for the First Circuit affirmed the judgment on the substantive count and ordered a new trial on the conspiracy count. On November 8, 1971, the Court of Appeals denied a timely petition for rehearing.

B. *The Facts*

One Christo Konstantakis, a Greek-born citizen of Canada, testified that he arranged to have two men travel up to Canada from western Massachusetts and smuggle two aliens back into the United States by stealing around a border check point. According to Konstantakis, he caused the two aliens to be brought into the country in this manner at the petitioner's request.

According to the petitioner, his understanding was that Konstantakis intended to use his influence with the American consul in Montreal to obtain visitors' visas for the two aliens. When he first learned that smuggling was involved, he immediately told Konstantakis to stop. Konstantakis stated that the aliens were already on their way down. The petitioner then decided that there was no point to further discussion and instructed Konstantakis to call when the aliens arrived in Massachusetts.

Reasons for Granting the Writ

Petitioner respectfully submits that the writ should issue because the Court of Appeals has decided a federal question in a way which is in conflict with applicable decisions of this Court and has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this Court's power of supervision over the administration of criminal justice in the federal courts, within the meaning of Rule 19 of this Court.

The petitioner's testimony that, after learning it was too late to stop the aliens, he told Konstantakis to call when they arrived became a principal point of attack for the Government during the remainder of the trial. Repeatedly, the prosecutor stressed to the jury the petitioner's failure to inform the border authorities anonymously of the illegal entry.

The defendant timely requested the following instructions:

> "1. (a) The defendant has testified that he first learned of smuggling in the course of a telephone conversation with Mr. Konstantakis on Tuesday, October 29, 1968, at which time he told Konstantakis not to

continue with the plan and Konstantakis said that the two aliens were already on their way down.

"(b) There was no duty on the defendant as a result of receiving this information to notify officials of the Immigration and Naturalization Service concerning the information received.

"(c) There was no duty on the defendant as a result of receiving this information to make an anonymous call to the Border Patrol notifying it of the information."

The trial court not only refused to give the requested instructions but, worse, instructed that the defendant would be criminally responsible for "the acts of another person" if wilfully "consented to" by the defendant. The *entire* instruction on the responsibility of an accessory before the fact was stated to the jury by the trial court as follows:

"I want to tell you, under the United States law, whoever wilfully causes an act to be done, which, if directly performed by him would be an offense against the United States, is punishable as a principal. Whatever a person is capable of doing himself, he can do through another person or by causing another person to do the act. *So that, if the acts of another person are wilfully* ordered, directed, authorized or *consented to by a defendant, he is just as responsible for those acts as if he personally committed them.*" (emphasis added)

Counsel for the petitioner duly objected to the trial court's refusal to give the requested instructions and, in the same connection, also objected to the contrary instruction that the petitioner was criminally responsible for the acts of *any* person, committed with his *consent*.

As to the first point, that is, the failure to instruct as requested, the Court of Appeals, without mentioning the requested instructions, said, in its slip opinion of October 12, 1971, at page 14, *infra:*

> "The defendant was under no duty to inform the authorities."

On petition for rehearing, the petitioner called to the attention of the Court of Appeals that it had apparently overlooked his requested instructions, which were to the same effect as the appellate court's holding on the point, but which were refused by the trial court. In denying the petition for rehearing on this point, the Court of Appeals stated merely that the requested instructions were "too broad" (see Memorandum and Order at page 18, *infra*).

As to the second, related point, that is, that the trial court erroneously held the petitioner responsible for the acts of *any* person, committed with his *consent,* the Court of Appeals said, at page 14, *infra:*

> "Defendant's next argument as to the propriety of the instructions on aiding and abetting is clearly without merit. The basic elements of the district court's instructions are found in 1 Devitt and Blackmar, Federal Jury Practice and Instructions §§ 11.06-11.12 (1970 ed.) and have been approved in many cases, including *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-619 (1949) upon which defendant relies. Finally, there was sufficient evidence adduced to justify the use of an 'agency' instruction."

In his petition for rehearing, the petitioner argued that, although the evidence warranted the use of an "agency instruction", the trial court had not, in fact, given such

an instruction to the jury. Instead, the trial court began with section 11.12. of 1 Devitt and Blackmar, *Federal Jury Practice and Instructions* (1970 ed.), which states, in part, as follows:

> "So, if the acts ... of an *employee or other agent* are ... consented to by the accused, then the law holds the accused responsible for such acts ..." (emphasis added)

Then the trial court translated this rule of law to the jury as follows:

> "So that, if the acts *of another person* are ... consented to by a defendant, he is just as responsible for those acts as if he personally committed them."

The effect was to take the "agency" out of the "agency instruction." As a result, the defendant was convicted on his own testimony that, when informed of the true nature of the illicit plan, he passively acquiesced by failing to report the crime to the authorities.

In its order denying the petition for rehearing, the Court of Appeals stated on this point:

> "It is not true that agency was not submitted to the jury. In fact, some of the phraseology now objected to was induced by the defendant."

We suspect that what the appellate court had in mind was that the jury was instructed, in connection with the conspiracy count (conviction of which was reversed), that a conspirator is an agent for each of his co-conspirators, under the rule in *Pinkerton* v. *United States*, 328 U.S. 640.

However, as stated in *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949):

> "A verdict on that [i.e., the *Pinkerton*] theory requires submission of those fact issues to the jury."

Nowhere in its charge did the trial court tell the jury, in accordance with the *Pinkerton* rule, that guilt under the conspiracy count might form the basis for a finding of agency under the substantive count. Moreover, even if it had so instructed, the fact remains that it gave the additional instruction that the defendant was *also* responsible for the acts of *any* person, committed with his consent.

As to the appellate court's statement that the objectionable instruction was "induced" by the defendant, each of undersigned counsel can only say, with earnest assurances of sincerity, that he is honestly unable even to guess at the court's meaning. Since this is the first suggestion by *anyone* of such an inducement, we are leaving it to the Government in its response to this petition.

That assent, acquiescence and approval are not sufficient to constitute one an accessory is clear. As stated in *Scales* v. *United States*, 367 U.S. 203, 224 (1961):

> "In our jurisprudence guilt is personal."

In *Baker* v. *United States*, 395 F.2d 368 (8th Cir. 1968), the court said, at 371:

> "the term 'aiding and abetting' ... implies some conduct of an affirmative nature and mere negative acquiescence is not sufficient."

In *United States* v. *Dellaro*, 99 F.2d 781 (2d Cir. 1938), the court said, at 783:

> "Inaction is of course acquiescence, but acquiescence is passive, and to become a party to a crime one must affirmatively unite oneself with the venture, or, in the case of a conspiracy, must agree to take some part in it."

The correct rule governing the responsibility of an accessory has been stated by this Court in *Williams* v. *United States*, 341 U.S. 58, 64 (1951), as follows:

> "Aiding and abetting means to assist the perpetrator of the crime."

The classic and most often cited definition, however, appeared originally in *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) and was adopted by this Court in *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949):

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed'."

From the foregoing, it is quite plainly not the law that mere "consent" to the acts "of another person" can be adequate to establish the affirmative conduct necessary to an aiding and abetting. Nor does there seem to be any room for argument that the error was not prejudicial. On the instruction as given, if the jury disbelieved entirely the portions of Konstantakis' testimony implicating the petitioner and believed entirely the petitioner's testimony, they were nevertheless still required to convict on the basis of that part of the petitioner's testimony in which he admitted his inaction in failing to report the crime in progress when informed of it by Konstantakis.

Finally, since the verdict is clearly not supportable on a "consent" standard of criminal responsibility and it is impossible to tell which standard the jury applied, the verdict must be set aside under the rule of *Yates* v. *United States*, 354 U.S. 298, 312 (1957).

We recognize, of course, that this drastic departure by the First Circuit from the applicable decisions of this Court is probably attributable to that court's understandable desire to keep pace with its ever-growing docket. We also recognize that this Court long ago passed the point of human ability to supervise with complete strictness the entire federal judiciary. On the other hand, the rule of criminal responsibility under which this petitioner was convicted is so outrageously alien to our law that it simply cannot be allowed to stand. That the injustice is not apparent on the face of the lower court's opinion or that only one man might suffer from it is not a valid consideration. We submit that the case should stand no different than if the petitioner were convicted under a statute imposing criminal responsibility on all who "consent" to the wrongdoing of *any* person.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 71-1076.

UNITED STATES OF AMERICA,
APPELLEE,

v.

JOHN F. DRISCOLL,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Francis J. DiMento, with whom *DiMento & Sullivan* and *Thomas C. Cameron* were on brief, for appellant.
William A. Brown, Assistant United States Attorney, with whom *Herbert F. Travers, Jr.*, United States Attorney, and *James B. Krasnoo*, Assistant United States Attorney, were on brief, for appellee.

October 12, 1971.

McENTEE, *Circuit Judge*. Defendant appeals from his conviction on two counts of a three count indictment. The first count charges him as an accessory to an attempt to smuggle aliens into the United States in violation of 8 U.S.C. § 1324(a) (1970). The second count was withdrawn at trial. The third count charges conspiracy to commit the above offense in violation of 18 U.S.C. § 371 (1970). For reasons set forth below we reverse the conviction on the conspiracy count and affirm on the substantive count.

On October 23, 1968, one Fontes consulted the defendant,

an attorney with a substantial immigration practice, about obtaining a bond covering the admission of Fontes' relatives — citizens of Portugal residing in Canada — into the United States on visitors' visas. The purpose of the bond was to insure that the visitors depart from the United States upon the expiration of their visas. Defendant advised Fontes to go to the Immigration Service office in Boston himself and execute the bond since this was a routine matter. For reasons not relevant here, the authorization for the bonds was withdrawn by the American Consul in Montreal while Fontes was at the Immigration office. As Fontes was returning to the defendant's law office, the two met on the street and went together to the Immigration office. There the defendant conferred with the Deputy District Director in an unsuccessful attempt to have the decision reversed. This was alleged as overt act number two of the conspiracy count.

Two days later the defendant spoke with one Konstantakis, a Greek-born citizen of Canada, who had entered the United States in 1967. Konstantakis had previously retained the defendant for the purpose of becoming a permanent resident. Defendant told Konstantakis that he wanted to get two men down from Canada without a border inspection. The latter replied that he had heard of people in Canada who get paid for doing such things and that he would try to get more information and call him back. This is alleged as overt act number one of the conspiracy count.

There was testimony of a subsequent conversation between the defendant and Konstantakis during which the figure of $800 was mentioned in connection with bringing the two aliens into the United States. Konstantakis testified that defendant said $800 was a lot of money but that he would have Fontes call Konstantakis to make the arrangements directly. This was alleged as overt act number three. Subsequently Konstantakis decided to use two local people

at a cost of $250. Shortly thereafter, these people, together with the aliens, were detected crossing the border and were arrested.

While the smuggling was in progress defendant called Konstantakis to discuss the price. The defendant asserted that it was during this conversation that he first learned that smuggling was involved, having previously thought that Konstantakis knew people in the consul's office in Canada and would use his influence there to reverse the decision denying the visas. Defendant also asserted that he told Konstantakis to stop the smuggling because it could do no good for the aliens to enter that way, but when informed that the four men were already on their way down, he instructed Konstantakis to call when they arrived.

Defendant alleges that it was error to permit the prosecutor to cross-examine him and to argue to the jury his failure to alert the authorities, at least anonymously, that two aliens would attempt to cross the border. The defendant was under no duty to inform the authorities. *See Scales* v. *United States*, 367 U.S. 203, 227-28 (1961); *United States* v. *Dellaro*, 99 F.2d 781, 783 (2d Cir. 1938); *Boyett* v. *United States*, 48 F.2d 482 (5th Cir. 1931). This cross-examination and argument were proper, however, as tending to impeach defendant's testimony that he acted in good faith.

Defendant's next argument as to the propriety of the instructions on aiding and abetting is clearly without merit. The basic elements of the district court's instructions are found in 1 Devitt and Blackmar, Federal Jury Practice and Instructions §§ 11.06-11.12 (1970 ed.) and have been approved in many cases, including *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-19 (1949) upon which defendant relies. Finally, there was sufficient evidence adduced to justify the use of an "agency" instruction.[1]

[1] While the Court in *Nye & Nissen* did not specifically address itself to "agency" instructions, it said:

Defendant's argument that secondary evidence of a letter from the defendant demanding a $2500 payment from Fontes was improperly admitted is also without merit. This argument is fully answered in the Memorandum and Order of the district court on defendant's motion for a judgment of acquittal or for a new trial. The district court found that the original of this letter from the defendant to Fontes "had become unavailable otherwise than through the fault of the proponent, the United States, which never had custody or control of the letter," citing *Sylvania Electric Products, Inc.* v. *Flanagan*, 352 F.2d 1005 (1st Cir. 1965). Moreover, in the light of our opinion in *United States* v. *O'Connor*, 433 F.2d 752 (1st Cir. 1970), *cert. denied*, 401 U.S. 911 (1971), the district court was clearly correct. The court's finding that the prosecutor's argument to the jury on this issue was within the scope of the evidence is fully supported by the record and there was no abuse of discretion. *Hale* v. *United States*, 410 F.2d 147, 152 (5th Cir.), *cert. denied*, 396 U.S. 902 (1969).

Relying on *Scales* v. *United States*, *supra*, defendant also alleges that it was error to use the word "encouraged" in defining conduct sufficient to find the defendant a member of the conspiracy. When read in the context of the charge as a whole,[2] it is obvious that this was proper. *See* 1 Devitt

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"In *Pinkerton* v. *United States*, *supra*, a conspiracy and substantive offenses were charged. We held that a conspirator could be held guilty of the substantive offense even though he did no more than join the conspiracy, provided that the substantive offense was committed in furtherance of the conspiracy and as a part of it. . . .

. . . .

The rule of that case does service where the conspiracy was one to commit offenses of a character described in the substantive counts. Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy." *Id.* at 618-20.

[2] "To participate wilfully and knowingly in a conspiracy means to participate voluntarily and understandingly with the intention of doing something which the law forbids, with the intention of disobeying or disregarding the law.

and Blackmar, *supra*, § 29.05, and the cases cited therein. Furthermore, defendant's reliance on *Scales* is misplaced since in that case the court was addressing itself to "the relationship between the fact of membership and the underlying substantive illegal conduct in order to determine whether the relationship is indeed too tenuous to permit its use as the basis of criminal liability." *Scales* v. *United States*, *supra* at 226. In that case the Court specifically distinguished its analysis of membership in the Communist Party from the "familiar concepts of the law of conspiracy. . . ." *Id.* at 225. Moreover, the Court found that active membership is sufficient *encouragement* to permit the imposition of criminal sanctions. *Id.* at 227-28.

Finally, defendant contends that it was error to submit alleged overt act number two of the conspiracy count to the jury. As we said in *Napolitano* v. *United States*, 340 F.2d 313 (1st Cir. 1965), "the government might have avoided some of the arguments which have been advanced here and below by taking care not to allege marginal acts in the indictment." *Id.* at 314. This is especially true in the instant case where evidence of the attempted smuggling would have been a sufficient overt act to support a conviction of the defendant on the conspiracy count.[3] The overt act "of only a single one of the conspirators" is sufficient. *Braverman* v. *United States*, 317 U.S. 49, 53 (1942); *McMurray* v. *United States*, 298 F.2d 619 (10th Cir. 1961), *cert. denied sub nom. Bryson* v. *United States*, 369 U.S. 860 (1962). However, since the conversation between the defend-

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"If the defendant with an understanding of the unlawful nature of the plan, *intentionally encouraged*, advised or assisted in it *for the purpose of furthering the plan or scheme*, he becomes a knowing and willing participant and thereby becomes a conspirator." (Emphasis added.)

[3] The contention that the jury in convicting the defendant on the substantive count must have found an attempt to smuggle, which would have been a sufficient overt act to sustain the conspiracy count, was neither briefed nor argued and we express no opinion with respect to it.

ant and the Deputy District Director was an act directed towards obtaining a lawful result by a lawful means and since it was in no way connected to or in furtherance of the conspiracy, it cannot support a conviction for conspiracy. *See Deacon* v. *United States*, 124 F.2d 352 (1st Cir. 1941). The jury returned a general verdict and since it might have disbelieved alleged overt acts numbered one and three and rested its verdict on alleged overt act numbered two, which is legally insufficient, the conspiracy conviction cannot be upheld. *Grunewald* v. *United States*, 353 U.S. 391, 415 (1957); *Yates* v. *United States*, 354 U.S. 298, 312 (1956); *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931). There is sufficient evidence, however, for the jury to have found the defendant guilty of the substantive count.

The defendant was given concurrent jail sentences plus a fine on the substantive count. We do not see that the error on the conspiracy count affected the other. Judgment shall be entered vacating the judgment on the conspiracy count, but affirming the judgment on the substantive count.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1076.

UNITED STATES OF AMERICA,
APPELLEE,

v.

JOHN F. DRISCOLL,
DEFENDANT, APPELLANT.

JUDGMENT

Entered October 12, 1971

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court as to Count 3 of the Indictment is vacated and the verdict as to said Count 3 is set aside.

The judgment of the District Court as to Count 1 of the Indictment is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. DiMento and Brown.]

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 71-1076.

UNITED STATES OF AMERICA,
APPELLEE,
v.
JOHN F. DRISCOLL,
DEFENDANT, APPELLANT.

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

MEMORANDUM AND ORDER
Entered November 8, 1971

Defendant's petition for rehearing is entirely meritless.

I. His requested instruction as to his failure to take steps to inform the authorities was too broad.

II. It is not true that agency was not submitted to the jury. In fact, some of the phraseology now objected to was induced by the defendant.

Point III is already dealt with.

This case not appearing in any sense certworthy, in accordance with our standing order bail is terminated with the issuance of the mandate.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. DiMento and Brown.]